INDEX

	Page
Motion	1
Statement	1
Statutes involved	2
Argument	5
Under the clear language of the statutes cited, Judge Mack's designation was valid and proper.	
Conclusion	7

CASES CITED

Ball v. *United States*, 140 U. S. 118, 129	7
McDowell v. *United States*, 159 U. S. 596	7
Ward, ex parte, 173 U. S. 452	7

STATUTES CITED

Judicial Code (act of March 3, 1911, c. 231, 36 Stat. 1087):	
S. 18 (as amended by act of September 14, 1922, c. 306, 42 Stat. 837, 839)	3
S. 19	4
S. 118 (as amended by act of February 25, 1919, c. 29, 40 Stat. 1156, 1157)	4
S. 201	3, 6, 7
S. 238a (added by act of September 14, 1922, c. 305, 42 Stat. 857)	8
Act of June 18, 1910, c. 309, s. 1 (36 Stat. 539, 540)	2, 6
Act of October 22, 1913, c. 32 (38 Stat. 208, 219)	5, 6

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the District Court is reported in 1 F. (2d) 63, and appears at R. 7–8. This case is a petition for habeas corpus to secure release after conviction. Previous decisions on direct review are found, sub. nom. *Donegan* v. *United States*, in 296 Fed. 843, and 265 U. S. 585 (denial of petition for certiorari).

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 185

ARTHUR E. DONEGAN, APPELLANT

v.

B. E. DYSON, AS UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF FLORIDA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT

The Solicitor General, on behalf of the appellee in the above-entitled cause, moves the Court, under Rule 6, to dismiss the appeal herein, or to affirm the judgment of the court below, on the ground that the appeal is frivolous and without merit, the sole question presented being expressly covered by the unambiguous language of statute law.

STATEMENT

The appellant, Donegan, was convicted in the Southern District of Florida on an indictment which charged willful abstraction and misapplica-

tion of the funds of a national bank, of which he was president. He was tried and sentenced by Judge Mack, one of the additional Circuit Judges appointed under the Commerce Court Act of June 18, 1910, c. 309 (36 Stat. 539). Judge Mack held the term under a special designation from the Chief Justice (R. 3). The Circuit Court of Appeals sustained Donegan's conviction (296 Fed. 843); and this Court denied his petition for certiorari (265 U. S. 585).

Having thus exhausted the opportunities for direct review of his conviction, he has now sued out a writ of *habeas corpus,* to obtain his release from the custody of the marshal. The sole ground of his application for the writ is his contention that Judge Mack was without authority to preside at the trial, and that his conviction was therefore a denial of due process of law. The District Court refused to accept this contention and ordered him remanded to serve his sentence. Its opinion is reported in 1 F. (2d) 63, and appears also at pages 7–8 of the Record. On this altogether frivolous issue, he is now for the second time seeking review or delay in this Court.

STATUTES INVOLVED

Section 1 of the Act creating the Commerce Court provides (Act of June 18, 1910, c. 309, 36 Stat. 539, 540):

> * * * The President shall, by and with the advice and consent of the Senate,

> appoint five additional circuit judges, no two of whom shall be from the same judicial circuit, who shall hold office during good behavior and who shall be from time to time designated and assigned *by the Chief Justice of the United States* for service in the circuit court for any district, or the circuit court of appeals for any circuit, or in the commerce court. * * *

Judge Mack was one of the five additional circuit judges appointed under this section.

During the period when the Commerce Court was in existence, the Judicial Code was enacted. Section 201 of the Judicial Code provides (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1147):

> The five additional circuit judges authorized by the Act to create a Commerce Court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned *by the Chief Justice of the United States* for service *in the district court of any district,* or the circuit court of appeals for any circuit, [or in the Commerce Court], and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit.

Section 18 of the Judicial Code as amended provides (Act of Sept. 14, 1922, c. 306, 42 Stat. 837, 839):

> The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a District Court within such circuit * * *. During the period of service of any judge designated and assigned under this Act he shall have all powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds): *Provided, however,* That in case a trial has been entered upon before such period of service has expired and has not been concluded, the period of service shall be deemed to be extended until the trial has been concluded.

Section 19 of the Judicial Code provides (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1090):

> It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

Section 118 of the Judicial Code, as amended, provides (Act of February 25, 1919, c. 29, 40 Stat. 1156, 1157):

> * * * The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided, That nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided for and authorized in other sections of this Act.*

By the Act of October 22, 1913, c. 32 (38 Stat. 208, 219), the Commerce Court was abolished, without prejudice to the tenure of the judges then in office. The Act provided:

> * * * Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, *but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals;* and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed. [Italics ours.]

ARGUMENT

Under the clear language of the statutes above cited, Judge Mack's designation was valid and proper.

Judge Mack was designated, by a letter from the Chief Justice, to hold the term at which the appellant was convicted. The Chief Justice's

letter (R. 3) recites that the Senior Circuit Judge has certified an urgency of business in the district, and that Judge Mack has consented to serve. It then states:

> * * * now, therefore, pursuant to the authority vested in me by Section 201 of the Judicial Code of the United States as amended by the acts of congress approved October 22, 1913, I do Hereby Designate and Assign you for service in the District Court of the United States for the Southern District of Florida, during the period commencing January 20, 1923, and ending March 31, 1923, and for such further time as may be required to complete unfinished business.

In the court below the appellant strenuously argued that Section 201 of the Judicial Code was repealed by the Act of 1913 (supra). The basis for this argument is nowhere apparent. The Act of 1913 specifically provided that the judges in question should "*continue to act under assignment,*" *as judges of the district courts* and circuit courts of appeals. Under both the original Act of 1910 and Section 201 of the Judicial Code this assignment is to be made *by the Chief Justice.* It is submitted that the language of all these acts is clear, that it means precisely what it says, and that by no possible twisting of words can it be brought to mean something entirely different. Under the above acts the judges mentioned have held court for more than twelve years;

and so far as can be discovered, their authority to do so has never for an instant been questioned. Nowhere can there be found a suggestion that Section 201 of the Judicial Code has been repealed. If a statute which expressly states that the Chief Justice *may* assign certain judges to hold district court in any district means that he *may not* so assign them, a new and startling rule of statutory interpretation by opposites has come into effect.

In view of the very clear language of the statutes, the Government deems it unnecessary to argue that Judge Mack may in any event be regarded as a judge *de facto,* whose designation can not be collaterally attacked. (*Ex parte Ward,* 173 U. S. 452; *McDowell* v. *United States,* 159 U. S. 596; *Ball* v. *United States,* 140 U. S. 118, 129.) The clear terms of the law, it is submitted, authorized his designation as a judge *de jure.* As a judge *de jure* he was designated by the Chief Justice with all the powers of the regular District Judge. And as a judge *de jure* he presided at the trial of the appellant.

CONCLUSION

The sole issue raised by the petition for *habeas corpus* concerns the designation of Judge Mack. The petitioner claims that he was tried *coram non judice,* and that his conviction was therefore without due process of law. If this contention had merit, it must be conceded that it would raise a constitutional question properly cognizable in this

Court. But for the reasons set forth above it is submitted that the contention has no merit and that the appeal is frivolous.

There is in this case no other contention which could possibly be open for argument in the Circuit Court of Appeals. No ground therefore exists for transferring the appeal to the Circuit Court of Appeals under section 238a of the Judicial Code (Act of September 14, 1922, c. 305, 42 Stat. 837). Such a transfer could accomplish no useful purpose and would result only in further delay.

It is therefore respectfully submitted that this appeal should be dismissed or, in the alternative, that the judgment of the District Court should be affirmed. And in order that speedy justice may be done, and that the appellant may without further delay begin to serve the sentence imposed upon him nearly three years ago, it is respectfully requested that the mandate of this Court should issue forthwith.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.

AUGUST, 1925.

○

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 185.—October Term, 1925.

Arthur E. Donegan, Appellant, *vs.* B. E. Dyson, as United States Marshal for the Southern District of Florida.	Appeal from the District Court of the United States for the Southern District of Florida.

[November 16, 1925.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is an appeal from a judgment in a *habeas corpus* case remanding the petitioner. It is brought under Section 238 of the Judicial Code, on the ground that it involves the construction or application of the Constitution of the United States.

March 5, 1919, Donegan was indicted in the United States District Court for the Southern District of Florida, and in the Tampa Division, charged with the offense of misapplication and abstraction of funds of a National Bank in violation of the banking laws of the United States. At a subsequent term he was tried, convicted and sentenced to a term of three years' imprisonment in the Atlanta Penitentiary. On a writ of error his conviction was affirmed by the Circuit Court of Appeals for the Fifth Circuit. He applied for a writ of certiorari in this Court, which was denied. 265 U. S. 585. While in the custody of the United States marshal, after the coming down of the mandate of the Circuit Court of Appeals, he filed this petition for the writ of *habeas corpus*. The ground for the petition is that United States Circuit Judge Julian W. Mack, who presided in the cause in which the petitioner was convicted, had no power or jurisdiction to act as Judge in the District Court for the Southern District of Florida. Judge Mack, as the petition avers, was one of the five additional United States Circuit Judges appointed at the time of the creation of the Court of Commerce, by virtue of the Act of June 18, 1910, 36 St. 539, c. 309. The petition sets out the designation in accord with which Judge Mack sat:

"Honorable Julian W. Mack,
United States Circuit Judge,
New York, N. Y.

"Sir:

"The Senior Circuit Judge of the Fifth Circuit having certified that on account of the accumulation and urgency of business in the United States District Court for the Southern District of Florida, it would be a great public advantage if you could be assigned to service in said District court, and your consent in writing to be designated and appointed to serve in said district court having been duly signed and exhibited to me, now, therefore, pursuant to the authority vested in me by section 201 of the Judicial Code of the United States as amended by the acts of congress approved October 22, 1913, I do hereby designate and assign you for service in the District Court of the United States for the Southern District of Florida, during the period commencing January 20, 1923, and ending March 31, 1923, and for such further time as may be required to complete unfinished business.

"Dated January 11th, 1923, Washington, D. C.

WM. H. TAFT,
Chief Justice of the United States."

It is said that this designation was without authority of law and therefore that the proceeding in the District Court against the petitioner was *coram non judice* and his conviction and present custody in pursuance thereof is without due process of law in violation of the Fifth Amendment.

The original Act creating the court had this provision (36 Stat. 541, c. 309):

"If, at any time, the business of the Commerce Court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any circuit court or circuit court of appeals."

When by the Judicial Code the circuit courts were abolished, 36 St. 1087, and in Chapter 13 the powers of the circuit courts were conferred upon the district courts, sections 291 and 292 of that chapter provided:

"Sec. 291. Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

"Sec. 292. Whenever, in any law not contained within this Act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this Act into which has been carried or revised the provision of law to which reference is so made."

In addition to these provisions, Section 201 of the Judicial Code provided expressly as follows (36 St. 1087, 1147):

"Sec. 201. The five additional circuit judges authorized by the Act to create a Commerce Court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned by the Chief Justice of the United States for service in the district court of any district, or the circuit court of appeals for any circuit, or in the Commerce Court, *and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit.*"

The Commerce Court was abolished by the Act of October 22, 1913, ch. 32 (38 St. 208, 219). While the court was abolished, no attempt was made to abolish the offices of the Judges. More than that, there was this special saving clause in the Act abolishing the Commerce Court, 38 St. 219:

"Nothing herein contained shall be deemed to affect the tenure of any of the Judges now acting as Circuit Judges by appointment under the terms of said Act, but such Judges shall continue to act under assignment, as in the said Act provided, as Judges of the District Courts and Circuit Courts of Appeals."

The contention is first that Sections 200 to 206 of the Judicial Code, which incorporated the provisions of the Act establishing the Commerce Court, were necessarily repealed by the Act of October 22, 1913, taking effect December 31, 1913. In view of the saving clause of that Act, we think this view quite untenable, and that Section 201 was entirely saved in its application.

It is then submitted that even if Section 201 was saved, that the Circuit Judge surviving the Court of Commerce is a judge without a circuit and that when assigned to the Fifth Circuit or any other circuit he goes to the circuit as *pro tempore* a judge of that circuit, and has only the powers and jurisdiction of such Circuit Judge provided in Section 201, which are the powers and jurisdiction conferred in the Judicial Code "upon a Circuit Judge in his Circuit." Now it is said that a regularly appointed circuit judge in a circuit can exercise power and jurisdiction in a district court

of his circuit only after designation and assignment by the circuit justice of his judicial circuit, or by the senior circuit judge thereof, in accordance with the language of Section 18, which is, as amended September 14, 1922 (42 St. 837, ch. 306):

"Section 5. The Chief Justice of the United States or the Circuit Justice, in any judicial circuit, or the Senior Circuit Judge thereof, may, if the public interest requires, designate and assign any Circuit Judge of a judicial circuit to hold a district court within such circuit."

The reference to the Chief Justice, it is said, is to him only as a circuit justice in the circuit to which he is allocated by order of the Court, and that at the time was the 4th Circuit, not the 5th. It is urged, therefore, that after the Chief Justice had under Section 201 assigned this former Commerce Court Circuit Judge to the 5th Circuit, it was, in addition, necessary that the Circuit Justice of the 5th Circuit, or the Senior Circuit Judge of that circuit, should then assign him as a *pro tempore* Circuit Judge of the 5th Circuit to the particular district court of that circuit in which he was to exercise the duties of a district judge. We think such reasoning is making complex a very simple statute and going out of the way to create confusion. Section 201 gives to the Chief Justice full discretion without further designation by any other judge to vest in a commerce court circuit judge full authority directly to act as judge either in a particular district court or in the circuit court of appeals of any circuit, and the designation of Judge Mack in this case was ample for the purpose. We thus do not think it necessary to consider whether even if the designation had not been valid, the sitting judge should be regarded as a judge *de facto* whose authority could not be questioned in a collateral attack, like a proceeding in *habeas corpus.*

No question has been made whether the appeal really involves the construction or application of the Federal Constitution, such that if the construction contended for were correct and the judge were sitting without warrant, the trial would be without due process of law. We have assumed that for the purposes of the decision and also that the question could be raised on *habeas corpus.*

The action of the District Court in dismissing the petition and remanding the prisoner is

Affirmed.